

CORPORATE DEBT RESTRUCTURING MECHANISM IN INDIA – A SPECIAL REFERENCE TO CORPORATE INSOLVENCY RESOLUTION PROCESS

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Abstract: *The methodology used for research is doctrinal research method. This paper speaks about the corporate debt restructuring mechanism in India, with a special reference to the corporate insolvency resolution process. The paper is divided into 6 parts, the paper starts with the idea of a company being a juristic person to whom law has attributed a legal status and hence it is different from a human being and is a juristic person. The paper then continues to say that a company is an ongoing concern, therefore it has perpetual succession and lives forever under dissolved or the company being in the procedure of winding up. Therefore there is a need to help the company when the company's liabilities are more than the assets or to restructure the company and thereby increase the life span of the company. The paper would mention various corporate restructuring mechanisms and would deal in detail about the Corporate Insolvency Resolution Process mentioned under the Insolvency and Bankruptcy code, 2016.*

Keywords: *Insolvency, corporate debt restructuring mechanisms, corporate insolvency resolution Process, juristic person and perpetual succession.*

I. INTRODUCTION

Law attributes legal personality to a company through statutes, it also recognises a company as a separate legal entity from its members. A company is capable of bearing rights and duties, liabilities and hold properties, even though it is not a human being. In ancient times legal personality was granted only to few persons, presently law attributes legal personality to all human beings, an artificial person, a group of people and idol. A company is a company incorporated under the Companies Act, 1956 or any other company law². A company is considered to be a perpetual entity unless wound up or declared insolvent. Therefore a company continues to exist distinct from its members³ and having different liabilities from its members. Since a company is considered to have a perpetual existence, it is therefore important to restructure a company which is sick or a company which has more liabilities than its assets or has more debt than its income. In order to facilitate a company to have a perpetual succession, a company may require restructuring to turn into a profitable company and repay the debts taken.

In India, certain mechanisms have been introduced by the Reserve Bank of India (RBI), the Securities and Reconstruction of Financial Assets and Enforcement of Securities Interest (SARFESI) Act, 2002, the Companies Act, 1956 and Insolvency and Bankruptcy Code (IBC), 2016. These mechanisms envisaged under these statutes and the RBI notification sought to restructure the companies and help these sick companies. An Article in the Business Standard, dated 1st November 2017 with the title 'India jumps 30 spots to 100 in world Bank's ease of doing business ranking', explains about India's position in ease of doing business. In the previous year of the report of the World Bank titled 'doing business, 2017, equal opportunity for all', had ranked India at 130th position for ease of doing business, but with the passage of the IBC code India has jumped to 100th position as per the World Bank report titled 'Doing business 2018, reforming to create jobs' explains about the insolvency code being one of the primary reasons for the jump of 30 spots in ranking.

II. DEBT RESTRUCTURING MECHANISM

The first debt restructuring mechanism introduced in India, was the Scheme of Arrangements. This mechanism was introduced through the Companies Act, 1956. A Scheme of Arrangement is a hybrid mechanism in which there is a court approved agreement between the company and its members (shareholders) or creditors to repay the debt or to restructure the company⁴. This mechanism caused a lot of delay since it had to go through court and had to receive its approval. Therefore RBI introduced the Corporate Debt Restructuring programme through its notification on 23rd August 2001. As per these guidelines the CDR mechanism, as per this mechanism, there is a requirement of 75% approval of the Creditors for the resolution plan. It is a non-statutory mechanism and it requires the assent of the creditors and the debtor to voluntarily take up this mechanism and restructure the company. This mechanism is used when the company is facing financial difficulties either internally or externally. Later through the SARFESI Act, the concept of Asset Reconstruction Companies was introduced in which the companies buy the non-performing assets (NPA) at a lesser price than the debt owed to the banks and try to restructure these companies. On 8th June 2015, RBI through its introduction of the Scheme of Strategic Debt Restructuring (SDR), it allows the banks

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² Sec. 2(20) Companies Act, 2013, No. 18, Acts of Parliament, 2013 (India).

³ Solomon v. Solomon [1897] AC 22 HL

⁴ Umakanth Varottil, THE SCHEME OF ARRANGEMENT AS A DEBT RESTRUCTURING TOOL IN INDIA: PROBLEMS AND PROSPECTS, http://law.nus.edu.sg/wps/pdfs/005_2017_Umakanth.pdf.

to convert a part of the debt owed to them or the whole debt owed to them into equity and take the controlling share of the company (at least 51% and above). Further, on 13th June 2016, RBI through its notification introduced the concept of Scheme for sustainable structuring of stressed Assets (S4A), according to this mechanism the control of the company remains with the promoter as long as 50 % of the total debt is sustainable. The RBI with its notification titled 'Resolution of Stressed Assets – revised framework' dated February 12, 2018, struck down all the mechanisms introduced by it, such as corporate debt restructuring programme and Strategic debt restructuring programme. Presently the RBI promotes the resolution plan mechanism given under the IBC code, 2016.

III. RESOLUTION PLAN UNDER THE INSOLVENCY AND BANKRUPTCY CODE

The Insolvency resolution procedure under the IBC code can be done voluntarily by the company with the approval of the board of directors, creditors and the members of the company; or it can be done the creditors whose amount due to them is more than 100,000 rupees. A creditor may file an application for corporate insolvency resolution procedure when the corporate debtor default, he may file the application alone or jointly with other financial creditors⁵. The application may be admitted or rejected based on the requirements specified under section 7 of the Insolvency and bankruptcy code, 2016. On the admission of the case, a notice will be sent to the corporate debtor, if the corporate debtor does not make the payment within 10 days⁶, the insolvency proceedings shall be initiated. A corporate debtor (who has defaulted) may file an application before the Adjudicating Authority (AA) for initiation of insolvency resolution process⁷. The time period specified under the IBC code, 2016 for completion of the insolvency resolution process is 180 days from the date of admission of the application⁸. A further extension may be granted of 90 days under the IBC code⁹ (once). Section 21 of the IBC speaks about the Committee of Creditors (Financial Creditors), where the majority vote of 75% and more shall be binding on the remaining creditors, a decision for a resolution professional also shall be taken by them¹⁰. The resolution professional is required to prepare an information memorandum and submit the resolution plan to the Committee of Creditors, the Committee of Creditors may accept the resolution plan with a vote share of 66% and above or instruct for a fresh resolution plan or appoint someone else for the submission of the resolution plan. During the resolution plan, the dues to the employees is usually paid within 30 days and the unpaid amount to the employees is considered as operational debt. Section 29A of the IBC code specifies persons who are ineligible to be appointed as resolution professional under the code, in the case of wigs associates' private ltd¹¹, the NCLT Mumbai, allowed a person related to the promoter to submit the resolution plan which was accepted by the Committee of Creditors. There was a question of law whether such a plan can be proposed by a person connected to the promoter, the NCLT ruled that the ordinance issued on 23rd November 2017 is prospective in nature and not retrospective, there the present case which was admitted on 24th August 2017 shall not be affected and the said person Mahindra Wig was allowed to propose the resolution plan and the resolution plan was executed.

IV. CASE STUDIES ON CORPORATE INSOLVENCY RESOLUTION PROCESS

The mechanism of Insolvency resolution Plan under the IBC was first used in the case of Synergies-Dooray Automobiles Limited¹², this case was decided in the National Company Law Tribunal (NCLT) Hyderabad, the company was an ancillary automobiles producer, producing car components¹³, the creditors on default by the company filed a case in the NCLT of Hyderabad after the IBC code was passed. The creditors sought for the insolvency resolution Process, through this process, the creditor recovered only 6% of the total debt which is around 54 crores out of the total debt amounted to about 972 crore rupees. The creditors waived off and lost about 94%¹⁴ of the total amount which they had to recover. In one of the reports of the rating Agency CRISIL, the reports emphasises that the out of total amount given to the top 50 corporate debtors, only 40% of the amount is recoverable¹⁵.

The central bank of India, the RBI, has promoted the statutory mechanism given under the IBC and has scrapped all the previous mechanism introduced by it. Even though, the mechanism Insolvency resolution plan, has seen a bad start, the RBI has not only promoted the same mechanism through its notification dated 12th February 2018, but also has referred some of the cases of NPA's to the NCLT.

In the case of *Punjab National Bank V. Bhushan Steel & powers ltd*¹⁶, the Principal bench NCLT at Delhi, directed to the Committee of Creditors to consider the resolution plan submitted by the Liberty House, even though the resolution plan was submitted after the last date of submission. In *Bank of Baroda and Ors. V. Vijaykumar V. Iyer*¹⁷, the NCLT Kolkata bench ruled that the Committee of Creditors will have to consider revised offer made by Ultra tech Cement after its initial bid was rejected, the tribunal also said that the other bidders such as Dalmia Group to match the revised offer of Ultra tech cements ltd. In another case¹⁸ the National Company Law Appellate (NCLAT) Tribunal held that initiation for corporate insolvency resolution plan process can be ordered on if there is a default by the corporate debtor and not if there is an unpaid debt owed by the corporate debtor.

⁵ Sec. 7 Insolvency and Bankruptcy Code 2016, No. 13, Acts of Parliament, 2016 (India).

⁶ Sec. 8 Insolvency and Bankruptcy Code 2016, No. 13, Acts of Parliament, 2016 (India).

⁷ Sec. 10 Insolvency and Bankruptcy Code 2016, No. 13, Acts of Parliament, 2016 (India).

⁸ Sec. 10 Insolvency and Bankruptcy Code 2016, No. 13, Acts of Parliament, 2016 (India).

⁹ Sec. 10 Insolvency and Bankruptcy Code 2016, No. 13, Acts of Parliament, 2016 (India).

¹⁰ Sec. 22 Insolvency and Bankruptcy Code 2016, No. 13, Acts of Parliament, 2016 (India).

¹¹ C.P. NO.1214/I&BC/NCLT/MB/MAH/2017

¹² Edelweiss Asset Reconstruction Company Limited Vs. Synergies-Dooray Automotives and ors. MANU/NC/0729/2017

¹³ Nupur Anand, THE FIRST CASE UNDER INDIA'S NEW BANKRUPTCY CODE HAS SENT A SHIVER DOWN LENDERS' SPINES QUARTZ INDIA (2017), <https://qz.com/india/1063131/the-first-case-under-indias-new-bankruptcy-code-has-sent-a-shiver-down-lenders-spines/>

¹⁴ Deborshi Chaki, *Are there more cases like Synergies Dooray in offing?*, LIVE MINT, November 9, 2017,

<https://www.livemint.com/Companies/Swu01IP0ydv6lJPzPhC8LL/Are-there-more-cases-like-Synergies-Dooray-in-offing.html>.

¹⁵ Nupur Anand, IN THE BAD-LOANS CRISIS, EVEN THE BEST-CASE SCENARIO FOR INDIAN BANKS IS PRETTY AWFUL QUARTZ INDIA(207AD), <https://qz.com/india/1033683/in-the-bad-loans-crisis-even-the-best-case-scenario-for-indian-banks-is-pretty-awful/>.

¹⁶ CA(IB) No. 152/PB/2018 in CP(IB) 202/PB/2017

¹⁷ MANU/NC/5343/2018

¹⁸ The State Trading Corporation of India Ltd. v. Gandhar Oil Refinery India Ltd., Company Appeal (AT)(Insolvency) No. 236/2018, decided on 24.05.2018

In *Surendra trading company V. Juggilal kamlapat jute mills Company Limited and others*¹⁹, the question before the supreme Court was regarding the admissibility of the application of the within 14 days from the date of application if filed before the NCLT and time period of 7 days given under the IBC code, whether such provisions are mandatory or discretionary, the NCLAT held that the 14 days' time period for the admissibility of the application is discretionary and the 7 days period is mandatory for rectification of the application and it cannot be extended. The Supreme Court held that there was rationale behind making the 7 days period for the rectification mandatory, it held that the time period could be extended but the extension should be subjected to any abuse.

In the Article 'Relief ahead for banks as deadline for resolving 10 major NCLT cases nears'²⁰, speaks about the 12 cases referred to the NCLT by the RBI. It also estimates losses which may occur from the major cases through the resolution process, the losses are said to be about 52% of the total amount to be recovered. But through the process of Bidding which forms a part of Insolvency resolution process the total percentage of the losses could be minimized as there is a possibility that the bidder may bid more than what is expected and the haircut losses may reduce. One such example is Bhushan steel, the company was India's biggest steel producers and had big car companies as clients like Maruti Suzuki, Bhushan steel was its peak of business in 2008 when the value of steel rose to 1,300 level. The company also had started to take loans and invest in its Odisha Steel plant. After the global crisis the price of steel reduced and Bhushan steel had to borrow money to repay the debts. The total amount of debt amounted to more than 40,000 crore during the insolvency proceedings instituted by SBI. Bhushan Steel being one of the major defaulter in list of RBI, the bidders were asked to submit their bids to the Committee of Creditors. The highest bidder, Tata steel's plan to bid the company for 32,500²¹ crore was accepted by the Committee of Creditors, the same was latter approved by the NCLT. Presently Tata Steel has bought Bhushan steel through its wholly owned subsidiary Bannipal steel (BNPL). Another instance where the corporate insolvency resolution process mechanism was used is in the case of Electrosteel. The debt-ridden company was bought by Vedanta an iron ore company. Vedanta has won the electrosteel bid for 5,000 crore and 90% of the capital would be owned by Vedanta²².

The Article²³, further speaks about the top defaulters, the article also speaks about the 12 cases referred by the RBI to the NCLT referred to as NCLT list 1 amounting to 3.22 trillion in claims and the second list amounts to 1.3 trillion. Therefore there is a need of fast track mechanism such as resolution process to speed up the procedure and help the companies as well as banks to settle their disputes. Further, the application made to the NCLT for insolvency can be withdrawn if the vote share in favour of the withdrawal is more than 90% from the Committee of Creditors. Therefore if a settlement is made through out of court settlement from any person who is ineligible to bid for the company or any person disqualified to submit the resolution plan. The Committee of Creditors withdraw the case filed for insolvency or insolvency resolution procedure.

During the process of Insolvency under the IBC code, If it is found out that the directors or any employee or former employee has intentions to defraud the creditors or has committed any fraud through the company or to conceal the information wilfully or to abstain from providing information during winding up proceedings. He will be held and punished by law. The defence available to the director or the employee is due diligence that he did not intent to defraud the company but has acted in a prudent and in a bona fide manner.

In the case of *Innoventive industries ltd. V. ICICI bank and others*²⁴, the question of law was whether the state legislation will override the central legislation, the petitioner had defaulted and failed to pay the amount. The Creditor filed in the NCLT and the present question of law arose. According to the state Act which was contended, the state takes over the company and then moratorium was to be issued under the said state Act. This procedure was contrary to the procedure mentioned under the IBC code. The NCLT held that the Insolvency resolution process will take place and the IBC code will override the state legislation.

In *Chitra Sharma and Ors.. V. Union of India and Ors.*²⁵, the question was raised before the whether the home buyers who had invested in the company Jaypee Infratech Limited had the right to take part in the insolvency resolution process, since the before the ordinance the home buyers had no right and interest under the Corporate Insolvency Resolution process. They sought for the refund of the money invested by them. But after the Ordinance the amendment permitted the home buyers who had invested in the company to take part in the resolution procedure. In the present case, since the resolution plan which was submitted was not accepted by the Committee of Creditors, the Supreme Court in the interest of all the homebuyers, issued directions to reconstitute the a fresh Committee of Creditors and to include homebuyers as per the Ordinance, further the court directed that the home buyers should have voting rights in this regard to accept the resolution plan or reject the same. In the case of *State Bank of India Vs. V. Ramakrishnan and Ors.*²⁶, the court ruled that the moratorium imposed during the Corporate Insolvency Resolution Process does not apply to the guarantor.

V. RBI'S ROLE IN CORPORATE INSOLVENCY RESOLUTION PROCESS.

In the case of *Essar Steel India ltd. Vs. Reserve Bank of India and Ors.*²⁷, the reserve Bank of India issued directions to the banks through a press release as per section 35 (AA) of the Banking Regulations Act, 1949 and section 3 (12) of the insolvency and bankruptcy code to initiate insolvency proceedings against the petitioner. The petitioner challenged the press release directing the banks to initiate the

¹⁹ Civil Appeal No. 8400 of 2017; MANU/SC/1294/2017

²⁰ Vishal Chhabria, RELIEF AHEAD FOR BANKS AS DEADLINE FOR RESOLVING 10 MAJOR NCLT CASES NEARS BUSINESS STANDARD(2018), https://www.business-standard.com/article/markets/relief-ahead-for-banks-as-deadline-for-resolving-10-major-nclt-cases-nears-118040401507_1.html.

²¹ Suresh Iyengar, NCLT CLEARS TATA STEEL'S ₹32,500-CRORE RESOLUTION PLAN FOR BHUSHAN STEEL BUSINESS LINE(2018), <https://www.thehindubusinessline.com/companies/nclt-clears-tata-steels-32500-crore-resolution-plan-for-bhushan-steel/article23896308.ece>.

²² Rakhi Mazumdar, VEDANTA'S ACQUISITION OF ELECTROSTEEL CREDIT POSITIVE: MOODY'S ECONOMIC TIMES(2018), <https://economictimes.indiatimes.com/markets/stocks/news/vedantas-acquisition-of-electrosteel-credit-positive-moodys/articleshow/63884351.cms>.

²³ Vishal Chhabria, RELIEF AHEAD FOR BANKS AS DEADLINE FOR RESOLVING 10 MAJOR NCLT CASES NEARS BUSINESS STANDARD(2018), https://www.business-standard.com/article/markets/relief-ahead-for-banks-as-deadline-for-resolving-10-major-nclt-cases-nears-118040401507_1.html.

²⁴ MANU/SC/1063/2017

²⁵ MANU/SC/0834/2018

²⁶ MANU/SC/0849/2018

²⁷ MANU/GJ/1563/2017

insolvency proceedings against it. The question of law was whether RBI had the power to direct the banks to initiate insolvency proceedings against the petitioner Essar Steel through a press release. The Court held that the Reserve Bank of India had the power to direct the other banks to institute corporate insolvency resolution process. It was further found that the Essar Steel had defaulted an amount of nearly 45,000 Crore.

In the Case of *Jayaswal Neco Industries Limited and Ors. Vs. Reserve bank of India and Ors.*²⁸, the Reserve Bank of India had issued Directions to the assignments of resolution plans to the Credit Rating Agency and the payments to be made by the RBI for the work done by it. The Petitioner in this *Jayaswal Neco Industries*, contended that RBI's involvement in directing the Credit rating Agency and involving in the process of paying would result in the involvement of the RBI and would warrant to interference by the RBI in the process of insolvency resolution process. The Bombay High Court ruled that the directions given by the RBI would not amount to interference in the process of resolution or insolvency. It also gave the rationale that the action of the RBI was just due to the rising rate of NPA's in the country amounting to nearly 8 lakh crore and the petitioners default amounting to nearly four thousand crore.

VI. CONCLUSION.

In the end, corporate insolvency resolution process, has been more efficient than the other mechanism which take more time. The present mechanism since it takes only 270 days to finish the entire process of restructuring the company, it is more efficient and helps the creditors to get paid off soon for their secured loans. If the committee of Creditors fails to approve any plan within 180, it can be subject to further extension of 90 days once. Still if there is no consensus within the Committee of Creditors, then the court would initiate the insolvency proceedings against the company, the company would be subjected to liquidation and a liquidator would be appointed. The insolvency proceedings can be withdrawn by the committee of creditors if the vote share is more than 90%. This mechanism is more preferred by the RBI since the rising rate of NPA's in the country is now amounting to about 8 lakh crore rupees. There is an eminent need to save the economy and restructure the NPA's so that the NPA's can be changed to performing assets and flourish in the country.



²⁸ MANU/MH/0406/2018